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OCTOBER TERM—1951

IN THE

Supreme Court of the United States

No. 233

C. A. DURR PACKING COMPANY, INC.,
Petitioner,

vs.

FRANK J. SHAUGHNESSY, Collector of Internal Revenue for the 21st District of New York,
Respondent.

Petition for Writ of Certiorari and Supporting Brief.

HENRY T. DORRANCE,
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Utica, N. Y.

THE REPORTER COMPANY, INC., Walton, N. Y.—1951

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C. A. DURR PACKING COMPANY, Inc.,
Petitioner,

vs.

FRANK J. SHAUGHNESSY, Collector of Internal Revenue for the 21st District of New York,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE SUPREME COURT OF THE UNITED STATES:

The petition of C. A. Durr Packing Company, Inc., respectfully shows:

I

Summary statement of matter involved

This action arose in the District Court for the Northern District of New York on November 8, 1946, on a complaint filed by C. A. Durr Packing Company to recover a portion of its federal income tax for the fiscal year ending October 31, 1940, which allegedly had been erroneously paid to and illegally collected by the defendant (R. 2-3). There was no controversy over the material facts, which were

stipulated, the question involved being purely one of law. The case was heard by the District Court without a jury.

C. A. Durr Packing Company is engaged in the meat-packing business in the City of Utica, N. Y., and reports its income and deductions for federal income tax purposes on the accrual basis of accounting (R. 14).

From about November, 1933 to February, 1935, Durr paid processing taxes imposed by the Agricultural Adjustment Act of 1933 in the amount of approximately $350,000 (Ex. 6). On January 6, 1936, this Court held such taxes to be invalid in *United States vs. Butler,* 297 U. S. 1.

As a result of the *Butler* decision, the processing taxes had been illegally collected, and under Section 3220 of the Revised Statutes (now Section 3770 of the Internal Revenue Code) Durr on January 6, 1936, forthwith was entitled to refund of the illegal processing taxes which it had paid.

Effective June 22, 1936, the Revenue Act of 1936 limited the amount of a processor's refund of processing taxes to that portion of the tax which the processor had actually borne as an economic fact, and had not shifted to his vendees in the form of higher prices (Title VII, Revenue Act of 1936, Secs. 902, 907; 7 U.S.C.A. Secs. 644, 649).

In 1940 Durr was allowed a refund of $27,900 of the invalid processing taxes it had paid (R. 18); the extent to which it had absorbed the burden of the tax under Section 907 of the 1936 Revenue Act.

It reported this $27,900 as income for the year 1940 (Ex. 13, p. 7). Subsequently, Durr sought refund of the 1940 income tax paid on the processing tax item upon the ground that item was not taxable as income on the accrual basis in 1940 (Ex. 14). The claim for

refund of overpaid 1940 income tax was first disallowed by the Treasury (R. 20), then allowed (R. 23), and finally again disallowed (R. 28).

This action followed. The District Court held that the processing tax refund accrued as income in 1940 and dismissed the complaint (R. 36). The Court of Appeals affirmed *per curiam,* Chief Judge Learned Hand dissenting (R. 46).

II

Jurisdiction

Jurisdiction is invoked under Section 1254(1) of Title 28 of the U. S. Code. The order of the Court of Appeals was filed May 31, 1951 (R. 47).

III

Question presented

The question presented is whether the $27,900 refund of processing tax accrued as income to petitioner in the year 1940 when the refund was determined and allowed by the Commissioner; or whether that refund accrued in prior years when the right to payment had fully ripened under the statutes and all events fixing the amount of refund had in fact occurred (see R. 39-116), except for the Commissioner's administrative determination of such amount.

IV

Reasons for granting the writ.

1. The Court below has decided an important question of federal income tax law in a way probably in conflict with the applicable decisions of this Court in *Continental Tie & Lumber Company vs. U. S.*, 286 U. S. 290; *United States vs. Anderson*, 269 U. S. 422; *Security Flour Mills vs. Commr.*, 321 U. S. 281; and *Dixie Pine Products Co. vs. Commissioner*, 320 U. S. 516. These cases have established and reaffirmed the fundamental principle of income tax accounting that items "accrue" in the year in which the events have occurred which fix the amount and the fact of liability.

The Chief Judge of the Court of Appeals, dissenting below in the instant case, indicated that there is no "* * * distinction of substance between the facts at bar, and those before the Supreme Court in *Continental Tie & Lumber Co. vs. United States* * * *" (R. 46).

2. The decision below is likewise in conflict with decisions of Courts of Appeals in the Fourth, Eighth, Tenth Circuits and the District of Columbia on the same basic question; namely the decision of the *Fourth* Circuit Court in *Southern Rwy. Co. vs. Comm.*, 74 F. (2d) 887; the decision of the Circuit Court for the *District of Columbia* in *Helvering vs. Gulf M. & N. Rwy.*, 71 F. (2d) 953, aff'd 293 U. S. 295 (on certiorari limited to another issue); the decision of the *Eighth* Circuit Court of Appeals in *Helvering vs. St. Louis Southwestern Rwy. Co.*, 66 F. (2d) 633, cert. den. 292 U. S. 626; the decision of the *Tenth* Circuit Court of Appeals in *Comm. vs. Midland Valley Rwy. Co.*, 57 F. (2d) 1042; as well as being in conflict with the Second Circuit Court's own decision in *Comm. vs. Old Dominion Rwy. Co.*,

47 F. (2d) 148. The foregoing decisions uniformly held that "excess compensation" awarded by the government to railroads for the period of federal control accrued as income, not in the year of determination or allowance of the award, but in prior years in which "* * * the facts upon which the obligation rested existed" (71 F. [2d] 953, at p. 955).

The decision below is likewise contrary to the Second Circuit Court's own decision in *Dumari Textile Co. vs. Comm.*, 142 F. (2d) 897, which followed the *Continental Tie* case, and held that a payment in 1938 of the amount of processing tax borne by a "dealer" (or vendee of a processor) accrued as income in 1936, the year in which all underlying events had become fixed, not in 1938 when the Commissioner allowed the refund (R. 46-7).

3. The instant case involves an important basic question of federal tax law. Either the *Continental Tie* case and other decisions of this Court are controlling, and the decision below is clearly erroneous because in conflict with principles now firmly established by this Court; or, if those cases are not controlling, the question here has not been settled by this Court, and an authoritative decision is desirable to secure uniform and consistent application of the accrual method of reporting income and deductions under the federal income tax laws.

If not reviewed and settled by this Court, the decision below will in all probability create even greater confusion over the accrual problem, a question which is already subject to much confusion, uncertainty and litigation. It seems, to say the least, somewhat paradoxical to observe the District Court in Alabama on February 1, 1951, following the *Continental Tie* case as controlling the time for accrual of income[1], and four months later find a ma-

[1] *Cloverleaf Creamery Co. v. Davis* (D. C. Ala., Feb. 1, 1951), F. Supp. , 51 C. C. H. Fed. Tax., Par. 9210.

jority of the Court below rejecting that same principle as controlling an identical problem in the instant case.

WHEREFORE, petitioner prays for a writ of certiorari from this Court to review the decision of the Court of Appeals for the Second Circuit in this case.

Dated: August, 1951.

Respectfully submitted,

C. A. DURR PACKING COMPANY, INC.,

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BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the Court of Appeals (R. 46) is not yet reported. The opinion of the District Court (R. 36) is reported at 81 Fed. Supp. 33.

Jurisdiction

Jurisdiction of this Court is invoked under Section 1254 (1), Title 28 of the U. S. Code.

Question Presented

Whether the refund of processing tax was properly held taxable income to petitioner, an accrual basis taxpayer, in 1940; or whether that refund accrued as income in 1936. The precise question here has not been passed upon by this Court.

Statutes Involved

The statutes involved are set forth in the Appendix, *infra,* pages 17-22.

Statement

The material facts are stated in the Petition (pp. 1-3) and will not here be repeated.

Assignment of Error

The Court below erred in holding the processing tax refund taxable income to petitioner in the year 1940.

Summary of Argument

1. The refund of processing tax did not accrue as income to the petitioner in 1940, but accrued in the year 1936 when:

(a) Petitioner's legal right to the refund had fully ripened under Sec. 3220 of the Revised Statutes and Secs. 902 and 907 of the Revenue Act of 1936; and

(b) Everything had happened which ever could happen to fix the amount of the refund under the statutory formula contained in Section 907 of the Revenue Act of 1936.

2. Nothing happened in 1940 to make the processing tax claim accruable in that year, except the Commissioner's administrative determination and allowance of the claim, purely a "ministerial" function not governing the time to accrue the refund as income.

ARGUMENT

1. Items accrue when the events have occurred to fix the fact and the amount of the right to receipt or liability to pay.

In *U. S. vs. Anderson* (1925), 269 U. S. 422, this Court held that deduction of a munitions tax which was neither payable nor determined until 1917 must be accrued for 1916, the year in which all of the events had occurred which fixed the amount of the tax and determined the liability of the taxpayer to pay it.

This basic principle governing accrual is now firmly established. It has often been reaffirmed by this Court

in decisions such as *Dixie Pine Products Co. vs. U. S.*, 320 U. S. 516, and *Security Flour Mills vs. Commr.*, 321 U. S. 281.

The same test governs accrual of income as well as deductions. In *Continental Tie and Lumber Co. vs. U. S.*, 286 U. S. 290, it was held that a wartime operating deficit award, granted by the Transportation Act of 1920 for loss of income under federal control, must be accrued as income in 1920, when the facts fixing the right to and the amount of the award had become fixed, and not in the year 1923 when the award was actually determined in amount and allowed by the Interstate Commerce Commission.

When the events have occurred to fix the right to receive an item and the amount of that item, a reasonable estimate is possible, and it must then be accrued as income even though the exact amount has not yet been definitely ascertained (*Continental Tie & Lumber Co. vs. U. S.*, 286 U. S. at 296-298). If the legal right to payment is uncertain because contested, or in litigation, or subject to some other contingency which does not occur until a later year, then of course the right to payment is not fixed and no accrual is required until the contingency is resolved (*Lucas vs. American Code Co.*, 280 U. S. 445). No such contingency existed here, however.

2. Every event fixing the legal right to and the amount of Durr's processing tax refund existed in the year 1936.

(a) **Legal right to refund.** From about November, 1933, to February, 1935 (Ex. 6), Durr paid AAA processing taxes which were ultimately held to be invalid by this Court's decision in *U. S. vs. Butler*, 297 U. S. 1. On January 6, 1936, when the *Butler* case held such taxes

to be unconstitutional, Section 3220 of the Revised Statutes (*infra*, App. p. 17), gave Durr the unqualified right to refund of such taxes, which were invalid and therefore had been illegally collected.

Congress recognized, however, that most processors had not actually absorbed the processing taxes as an economic fact, but had shifted the burden of tax to their vendees in the form of higher prices. Accordingly, in Sections 902 and 907 of the Revenue Act of 1936 Congress limited the amount of a processor's refund of tax to that much of the tax paid which the processor had actually borne and had not shifted to its vendees (*infra*, App. p. 17).

Section 907 of the Act created a simple arithmetical formula whereby the "burden" of tax borne was determined by comparison of the processor's "average margin" on sales during "the tax period" with the margin on sales during "the period before and after the tax." If the processor's margin was lower during the tax period than it was during the comparison period, the difference measured the extent to which he had presumptively borne the burden of the tax. July, 1936, was the last month included within the comparison period (Sec. 907[c]), and nothing that occurred after July, 1936, affected either the statutory right to processing tax refund, or the statutory measure of the "burden" of tax borne by a processor (*infra*, p. 20).

The opinion below recognized "* * * that the facts or events fixing the amount of the claim for refund and Durr's right to recover in the instant case were in existence in 1936" (R. 39-116). Under the settled rules governing time of accrual, that finding controls the result of this case. When "everything had happened which could have happened from which to determine the amount

of the payment," the payment must be accrued (*Dumari Textile Co.*, 47 B.T.A. 639 at 644).[1]

The opinion below also recognized the holding in the *Continental Tie* case (286 U. S. 290) that determination and allowance of the claim was "a ministerial act confined within prescribed limits" (R. 41-121). The Court then reached the contradictory conclusion that "Here the computation was subject to an adversary administrative proceeding" (R. 41-122), in which the Commissioner was acting in "a judicial capacity" (R. 42-125) in administering the statute—thus rendering the processing tax refund "contingent" upon the Commissioner's action (R. 42-125). This view is clearly erroneous—there was no contest or litigation over Durr's right to refund—it was absolute and unqualified for the amount of processing tax Durr had absorbed.

In the *Continental Tie* case the action of the Interstate Commerce Commission in passing on operating deficit awards was absolutely final and subject to no review.[2] The taxpayer there had argued that "quasi-judicial" action by the Commission was a condition precedent to an award, and a "contingency" preventing accrual of the award prior to its actual allowance—of the same nature as actual litigation in Court.[3] The opinion below bases its result on this argument of the Continental Tie Company—the very argument which this Court had rejected, saying:

> "But we think that the function of the Commission under the Act was ministerial, to ascertain the facts with respect to the carrier's operating income by a comparison of the experience during the test period with that during the term of federal control. The right to the award was fixed by the

[1] Aff'd *Dumari Textile Co. vs. Commr.*, 142 F. (2d) 897 (C.C.A. 2).

[2] *Butte etc. Rwy. Co. vs. U. S.*, 290 U. S. 127.

[3] Petitioner's Brief, *Continental Tie* case, p. 15.

> passage of the Transportation Act. What remained was mere administrative procedure to ascertain the amount to be paid. Petitioner's right to payment ripened when the Act became law" (286 U. S. p. 295).

Moreover, in the federal control cases, the Circuit Courts uniformly held that the date of administrative allowance of "excess compensation" awards had no bearing upon the time when such awards accrued as income —rejecting the government's contention that the date of allowance fixed the time of accrual for income tax purposes.

> *Southern Rwy. Co. vs. Commr.*, 74 F. (2d) 887 (C.C.A. 4).
> *Helvering vs. Gulf M. & N. Rwy.*, 71 F. (2d) 953 (C.C.A., D.C.) affd. 293 U. S. 295.
> *Helvering vs. St. Louis Southwestern Rwy.*, 66 F. (2d) 633 (C.C.A. 8), cert. den. 292 U. S. 626.
> *Commr. vs. Midland Valley Rwy. Co.*, 57 F. (2d) 1042 (C.C.A. 10).
> *Commr. vs. Old Dominion Steamship Co.*, 47 F. (2d) 148 (C.C.A. 2).

The time of accrual is fixed when the right to payment has ripened. The right to payment is controlled by the statutes—not by the time of administrative action under the statutes. The test is objective—not subjective.

So, in the instant case, Durr's right to processing tax refund had fully ripened under the statutes by the end of July, 1936. No "contingency" existed after that date as to the government's conceded liability under Section 3220 of the Revised Statutes to refund the illegal processing tax that Durr had borne as computed under Sec. 907 of the Revenue Act of 1936. All that remained to be done was administrative determination of the amount absorbed by comparison of "margins" as directed in Section 907.

(b) **Events fixing amount of refund.** No event could occur after July, 1936, to affect the amount of processing tax absorbed by a processor. In Section 907 of the 1936 Revenue Act, Congress had said that this "burden" was measured by the extent to which the "margin" during the "tax period" was less than the margin during "the period before and after the tax."

Under Section 907 (c) the "period before and after the tax" ended with the month of July, 1936. Thus, no fact or event occurring after July, 1936, could affect calculation of the refund (*infra,* p. 20).

Determination of "margins" during the tax period and the comparison period under the statutory formula involved the following factors:

1. "Gross sales value of articles processed" from the commodity (Sec. 907 [b] [1, 2, 6]).

2. "Cost of the commodity processed" (Sec. 907 [b] [1, 2, 5]).

3. "Processing tax paid with respect thereto" (Sec. 907 [b] [1]).

4. "Total number of units processed" each month (Sec. 907 [b] [1, 2]).

It is perfectly evident that under this formula "* * * the taxpayer had in its own books and accounts data to which it could apply the calculations required by the Statute and ascertain the quantum of the award within reasonable limits" (*Continental Tie* case, 286 U. S. at p. 296). It is equally apparent that a processing tax refund was much simpler of accurate computation and estimation under the Section 907 formula, than was a railroad operating deficit award under the Transportation Act of 1920 (49 U.S.C.A., Secs. 73, 77).

The confusion below may have stemmed from the fact that although Durr paid a total of $350,000 in processing taxes, the actual burden of the tax absorbed by it amounted to only $27,900, as ultimately determined under the statutory formula. The fact that Durr shifted most of the tax to its vendees has no bearing, however, upon the fact that in 1936 Section 907 prescribed a simple method of computing the amount of tax borne by Durr, nor the fact that all data considered under the statutory formula was available in 1936; any more than would the size of a railroad's federal operating deficit affect the time when the deficit award must be accrued as income.

3. The accrual principle of the *Continental Tie* and *Anderson* cases is firmly established in federal income tax law.

The accrual principle embodied in the *Anderson* and *Continental Tie* cases has been widely applied and is now firmly entrenched as one of the basic principles governing application of the federal income tax laws. Some illustrations of the widespread application of this principle in administering the tax laws are as follows:

(a) Refunds of overpaid state franchise taxes resulting from renegotiation of excessive profits accrue when renegotiation is completed, not when the refund is determined or paid.

Kenyon Instrument Co., 16 T. C. ....., No. 92.
H. O. Boehme, 15 T. C. 247.
Cf: Western Cartridge Co., 11 T. C. 246.
Taylor Instrument Company, 14 T. C. 388.

(b) Deduction of additional state franchise taxes, increased due to deficiency in federal income assessed in later years, accrues in the base year when the events occurred, not the later year when the deficiency was determined.

Uncasville Mfg. Co. vs. Commr., 55 F. (2d) 893, cert. den. 286 U. S. 545.

(c) Compensation derived from termination of war contracts accrues in the year of termination where "ascertained factors" in that year fix the amount of compensation.

Mimeo.—5897; 1945 C.B. 131.
Mimeo.—5766; 1944 C.B. 156.

(d) Refunds of Social Security taxes resulting from the 1939 amendments of Section 902 of the Social Security Act accrue as income on the date of enactment of the amendment, not the date of allowance.

I. T. 3421, 1940-2 C.B., p. 88.

(e) Butter subsidy payments under Defense Supplies Corp. Regulations accrue as income when the facts occur, though not determined or allowed until a later period.

Clover Leaf Creamery Co. vs. Davis, (D. C. Ala., Feb. 1, 1951), F. Supp. , 51 C.C.H. Fed. Tax Service, par. 9210.

(f) Refund of the amount of processing tax borne by a vendee in the cost of goods purchased accrues in 1936 when right established, not 1938 when refund determined.

Dumari Textile Co. vs. Commr., 142 F. (2d) 897.

(g) Income resulting from the collection of insurance on a fire loss accrues in the year of the fire, not in a later year when the loss is settled.

G.C.M., 14666, XIV—1 C.B. 181.

(h) Deduction of railroad vacation pay accrues at the end of the tax year when liability is fixed, though the amount payable is not ascertained until a later period.

I. T. 3956, 1949—1 C.B. 80.

CONCLUSION

In the *Continental Tie* case the taxpayer sought to recover an overpaid income tax from the government. The principle of accrual as there applied served to defeat recovery.

In the instant case, that same principle would entitle petitioner to recover its overpaid income tax. Merely because the shoe here is on the other foot would hardly seem to justify departure from the established rules governing taxation of income. The result here is controlled by the *Continental Tie* principle.

Standards of accrual for tax purposes should apply objectively and consistently, and without regard to whether they may work to the advantage of the government or the taxpayer in any particular instance.[4] Any other policy is to make a mockery of this Court's philosophy that "The uniform result (of the accrual principle) has been denial both to government and to taxpayer of the privilege of allocating income or outgo to a year other than * * * the year in which the right to receive, or the obligation to pay, has become final and definite in amount." (*Security Flour Mills,* 321 U. S. at 286-287.)

The writ should be granted.

August, 1951.

Respectfully submitted,

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[4] See *U. S. vs. Lewis,* U. S. , 95 L. Ed. 448 (March 1951).

APPENDIX

Statutes Involved

Section 3220 of the Revised Statutes (now Sec. 3770[a] I.R.C.) provided in part as follows:

"Except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes, the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or iliegally assessed or collected, all penaties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; * * *"

Section 902 of the Revenue Act of 1936 (7 U.S.C.A. 644) provides in part:

"**§644. Conditions of allowance of refunds**

No refund shall be made or allowed, * * * of any amount paid by or collected from any claimant as tax under this chapter, unless the claimant establishes to the satisfaction of the Commissioner * * *

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden directly or indirectly, * * *; or

(b) That he has repaid unconditionally such amount to his vendee * * *"

Section 907 of the Revenue Act of 1936 (7 U.S.C.A. 649) provides:

"**§649. Evidence and presumptions**

(a) Where the refund claimed is for an amount paid or collected as processing tax, as defined herein, it

shall be prima facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

(b) The average margin for the tax period and the average margin for the period before and after the tax shall each be determined as follows:

Tax Period

(1) The average margin for the tax period shall be the average of the margins for all months (or portions of months) within the tax period. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month deduct the cost of the commodity processed during the month and deduct the processing tax paid with respect thereto. The sum so ascertained shall be divided by the total number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

Period Before and After the Tax

(2) The average margin for the period before and after the tax shall be the average of the margins for all months (or portions of months) within the period before and after the tax. The margin for each such month shall be computed as follows: From the gross

sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month. The sum so ascertained shall be divided by the number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

Average Margin

(3) The average margin for each period shall be ascertained in the same manner as monthly margins under Subdivisions (1) and (2), using total gross sales value, total cost of commodity processed, total processing tax paid, and total units of commodity processed, during such period.

Combination of Commodities

(4) Where, as, for example, in the case of certain types of tobacco, the articles produced and sold by the claimant are the product of several commodities combined by him during processing, the average margins shall be established with respect to such commodities as a group, and not individually, in accordance with rules and regulations prescribed by the Commissioner, with the approval of the Secretary of the Treasury.

Cost of Commodity

(5) The cost of commodity processed during each month shall be (a) the actual cost of the commodity processed if the accounting procedure of the claimant is based thereon, or (b) the product computed by multiplying the quantity of the commodity processed by the current prices at the time of the processing for com-

modities of like quality and grade in the markets where the claimant customarily makes his purchases.

Gross Sales Value of Articles

(6) The gross sales value of articles shall mean (a) the total of the quantity of each article derived from the commodity processed by the claimant during each month multiplied by (b) the claimant's sale prices current at the time of processing for articles of similar grade and quality.

(7) The quantity of each article derived from the commodity processed may be either (a) the actual quantity obtained, as shown by the records of the claimant, or (b) an estimated quantity computed by multiplying the quantity of commodity processed by appropriate conversion factors giving the quantity of articles customarily obtained from the processing of each unit of the commodity.

(c) The "tax period" shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made. The "period before and after the tax" shall mean the twenty-four months (except that in the case of tobacco it shall be the twelve months) immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive. If during any part of such period the claimant was not in business, or if his records for any part of such period are so inadequate as not to provide satisfactory data on prices paid for commodities purchased or prices received for articles sold, the average prices paid or received by representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, where necessary for a fair

comparison, be substituted in making the necessary computations. If the claimant was not in business during the entire period before and after the tax, the average margin, during such period, of representative concerns engaged in a similar business and similarly circumstanced, as determined by the Commissioner, shall be used as his average margin for such period.

(d) If the claimant made any purchase or sale otherwise than through an arm's-length transaction, and at a price other than the fair market price, the Commissioner may determine the purchase or sale price to be that for which such purchases or sales were at that time made in the ordinary course of trade.

(e) Either the claimant or the Commissioner may rebut the presumption established by subsection (a) of this section by proof of the actual extent to which the claimant shifted to others the burden of the processing tax. Such proof may include, but shall not be limited to—

(1) Proof that the difference or lack of difference between the average margin for the tax period and the average margin for the period before and after the tax was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of article or commodity, or (B) in costs of production. If the claimant asserts that the burden of the tax was borne by him and the burden of any other increased costs was shifted to others, the Commissioner shall determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the changes in margin (when margins are computed for weeks, months, or other intervals between July 1, 1931, and August 1936, in the manner specified in subsection (b), and from the general experience of the industry, whether the tax or the increase in other costs was shifted

to others. If the Commissioner determines that the difference in average margin was due in part to the tax and in part to the increase in other costs, he shall apportion the change in margin between them;

(2) Proof that the claimant modified existing contracts of sale, or adopted a new form of contract of sale, to reflect the initiation, termination, or change in amount of the processing tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any vendee, or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the claimant may establish that such acts were caused by factors other than the processing tax, or that they do not represent his practice at other times. If the claimant processed any product in addition to the commodity with respect to the processing of which there was paid or collected an amount as tax for which he claims a refund, and if the Commissioner has reason to believe that the burden of such amount was shifted in whole or in part by means of the transactions relating to such product, the average margin with respect to such product, and articles processed therefrom, shall also be considered, and shall be determined for the tax period applicable to the commodity and for the period before and after the tax in the manner prescribed in subsection (b) of this section. To the extent the Commisioner determines that the average margin with respect to such product was higher during the tax period than it was during the period before and after the tax, it shall be prima facie evidence that such amount was not borne by the claimant but that it was shifted to others.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 233

C. A. DURR PACKING COMPANY, INC., PETITIONER

v.

FRANK J. SHAUGHNESSY, AS COLLECTOR OF INTERNAL REVENUE FOR THE 21ST DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the Court of Appeals (R. 46-47), adopting the opinion of the District Court, is reported at 189 F. 2d 260, together with the dissenting opinion of Chief Judge Learned Hand. The opinion of the District Court (R. 36-43) is reported at 81 F. Supp. 33.

JURISDICTION

The judgment of the Court of Appeals was entered on May 31, 1951 (R. 47-48). The petition

for a writ of certiorari was filed on August 10, 1951. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254.

QUESTION PRESENTED

Whether the sum of $27,900 paid to the taxpayer in its fiscal year ended October 31, 1940, as a partial refund of amounts paid and deducted by it in 1933, 1934, and 1935, as processing tax under the Agricultural Adjustment Act of May 12, 1933, as amended, was properly accrued and reported by the taxpayer as income in that year.

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 22 [as amended by Sec. 1 of the Public Salary Tax Act of 1939, c. 59, 53 Stat. 574]. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits

and income derived from any source whatever. * * *

* * * * *

(26 U.S.C. 1946 ed., Sec. 22.)

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. * * *

(26 U.S.C. 1946 ed., Sec. 41.)

SEC. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

(a) *General Rule.*—The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. * * *

(26 U.S.C. 1946 ed., Sec. 42.)

SEC. 43. PERIOD FOR WHICH DEDUCTIONS AND CREDITS TAKEN.

The deductions and credits (other than the corporation dividends paid credit provided in

section 27) provided for in this chapter shall be taken for the taxable year in which "paid or accrued" or "paid or incurred", dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period. * * *

(26 U.S.C. 1946 ed., Sec. 43.)

SEC. 48. DEFINITIONS.

When used in this chapter—

(a) *Taxable Year.*—"Taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under this Part. "Taxable year" includes, in the case of a return made for a fractional part of a year under the provisions of this chapter or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made.

(b) *Fiscal Year.*—"Fiscal year" means an accounting period of twelve months ending on the last day of any month other than December.

(c) *"Paid or Incurred", "Paid or Accrued".*—The terms "paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under this Part.

* * * * *

(26 U.S.C. 1946 ed., Sec. 48.)

STATEMENT

At all times material to this proceeding, C. A. Durr Packing Company, Inc., a New York corporation (herein referred to as the taxpayer), with its principal place of business at Utica, was engaged in the meat packing business. During its taxable years 1933 through 1940, the taxpayer kept its books and accounts, and reported its gross income and deductions for federal tax purposes, on an accrual method of accounting. During its taxable years 1933, 1934, and 1935, the taxpayer paid as taxes upon the first domestic processing of hogs under the Agricultural Adjustment Act of May 12, 1933, c. 25, 48 Stat. 31, as amended, the amounts of $22,655.01, $259,548.92, and $72,747.39, respectively, which it deducted from gross income in its income tax returns for those years. (R. 14-15; Ex. 1, 2, 3.)

The taxing provisions of the Agricultural Adjustment Act were held unconstitutional by this Court on January 6, 1936, in *United States* v. *Butler,* 297 U.S. 1, and in *Rickert Rice Mills* v. *Fontenot,* 297 U.S. 110, rehearing denied, 297 U.S. 726, it was held that subsequent amendments did not cure the substantive defects in the original enactment. Thereafter, Congress enacted the Revenue Act of 1936, c. 690, 49 Stat. 1648, Title VII of which (constituting Sections 901 to 917, inclusive) authorized the refund, subject to certain conditions and limitations, of amounts paid as tax under the Agricultural Adjustment Act.

On or about June 29, 1937, the taxpayer, pursuant to the provisions of the 1936 Act, filed a claim for refund of $350,289.56 of the amount paid by it under the Agricultural Adjustment Act in 1933, 1934 and 1935, as processing tax on hogs, and also filed a claim for refund of $4,568.87 paid by it as floor stocks tax under that Act (R. 15; Ex. 5, 6).

The taxpayer's claims for refund of processing and floor stocks taxes and its income taxes for the period during which such taxes were paid were matters of consideration over a period of time. It was ultimately agreed by the taxpayer and the Commissioner that, in consideration of the allowance by the Commissioner as deductions in 1934 and 1935 of the amounts paid as taxes under the Agricultural Adjustment Act, which amounts the Commissioner had proposed to disallow as deductions for the reason that claims for refund had been filed under Title VII of the Revenue Act of 1936, the taxpayer would include in its gross income for the years received or accrued, depending on its method of accounting, any and all amounts paid as taxes under the Agricultural Adjustment Act which were subsequently refunded or credited. (R. 16-17, Exs. 9, 10, 11.)

On October 11, 1940, the Commissioner accepted taxpayer's offer to settle its income and profits tax liability for 1935 and 1936, its unjust enrichment tax liability for those years, and its claims for refund of processing and floor stocks taxes men-

tioned above. Under this settlement, among other things, the taxpayer agreed to accept, as the refund due it of the processing taxes paid by it, the amount of $27,900 plus interest; to waive or withdraw the balance of $322,889.56 included in its claim for refund of processing tax; and to waive or withdraw its claim for refund of amounts paid as floor stocks tax (R. 17-18, Ex. 12). On or about October 29, 1940, a check covering the refund of processing tax in the amount of $27,900, with interest thereon in the sum of $10,074.34, was issued to the taxpayer in settlement of its claims for refund of processing taxes and floor stocks taxes paid by it in the years 1933, 1934 and 1935 (R. 18). The balance of the claim for refund of processing taxes and the claim for refund of floor stocks taxes was formally rejected by the Commissioner on October 11, 1940 (Ex. 12).

The taxpayer did not accrue the amount of the above refund of $27,900 on its books and records, or report such amount in its gross income for any taxable year prior to 1940. Instead, this sum of $27,900 refunded to the taxpayer in October, 1940, was reported as gross income in its federal income tax return for the fiscal year ended October 31, 1940. The tax shown to be due by this return was duly paid to the Collector. (R. 18; Ex. 13.)

On or about November 9, 1943, the taxpayer filed a claim for refund of $5,301 of the income tax paid by it for the fiscal year ended October 31, 1940, on

the ground that under the accrual method of accounting used by it, the above refund of $27,900 received in October, 1940, accrued and was includible in its taxable income for the calendar year 1936 and had erroneously been reported as income in its taxable year ended October 31, 1940 [1] (R. 18; Ex. 14). This claim was rejected by the Commissioner under date of November 18, 1944 (R. 18, 20). By letter dated September 16, 1946, the Internal Revenue Agent in Charge denied taxpayer's application for reconsideration of its disallowed claim for refund (R. 19, 31-33). This suit to recover the amount of $5,301 alleged to have been overpaid as income tax for the fiscal year ended October 31, 1940, was timely filed (R. 2-3).

The District Court held that the refund received by the taxpayer during its fiscal year 1940 accrued as income in that year and did not accrue as income to it in 1936 (R. 36-43). The Court of Appeals, Chief Judge Learned Hand dissenting, affirmed *per curiam* on the opinion of the District Court (R. 46-47).

ARGUMENT

1. The opinion of the District Court, which was adopted by the Court of Appeals (R. 46), fully recognizes (R. 38-39) the principle established by

[1] Apparently, the taxpayer changed from a calender year to a fiscal year ended October 31 with the filing of its return for the period ended October 31, 1937.

decisions of this Court,[2] that income and deductions accrue only when the right to receive the income or the liability or loss on which the deduction is based has become fixed without contingencies and when the amount to be accrued is settled or is ascertainable with a reasonable degree of certainty.

The taxpayer's right in this case to receive any amount as a refund of processing taxes was not automatic but was contingent: Title VII of the Revenue Act of 1936, c. 690, 49 Stat. 1648, specified the conditions to be complied with before a refund in any amount was due. Thus, no refund could be made unless a claim for refund, setting forth under oath all evidence relied upon, had been filed prior to July 1, 1937 (Section 903, 1936 Act) and unless the taxpayer established to the satisfaction of the Commissioner or, if he disallowed the claim in whole or in part, to the satisfaction of the Processing Tax Board of Review upon petition to it, that it had borne and had not shifted directly or indirectly the economic burden of such taxes (Sections 902 and 906).[3] Section 907 estab-

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[2] *United States* v. *Anderson*, 269 U.S. 422; *Lucas* v. *American Code Co.*, 280 U.S. 445; *Lucas* v. *North Texas Co.*, 281 U.S. 11; *Continental Tie & L. Co.* v. *United States*, 286 U.S. 290; *Spring City Co.* v. *Commissioner*, 292 U.S. 182, 184-185; *United States* v. *Safety Car Heating Co.*, 297 U.S. 88; *Dixie Pine Co.* v. *Commissioner*, 320 U.S. 516; *Security Mills Co.* v. *Commissioner*, 321 U.S. 281.

[3] By Section 510 of the Revenue Act of 1942, c. 619, 56 Stat. 798, the Board of Review was abolished and its jurisdiction was transferred to and was vested in the Board of Tax Appeals, now the Tax Court of the United States, pursuant to Section 504 of the same Act.

lished a *prima facie* presumption as to whether or not the burden of the tax was borne by the claimant based upon a comparison of the average margin per unit of the commodity processed during the tax period with the average margin per unit during the periods before and after the tax, as these terms were there defined, but it also provided that either the claimant or the Commissioner might rebut the presumption thus established by proof of the actual extent to which the burden was shifted. For this purpose any kind of relevant evidence, including expert testimony, was to be considered. See *Anniston Mfg. Co.* v. *Davis,* 301 U.S. 337, and *Webre Steib Co.* v. *Commissioner,* 324 U.S. 164, which discuss these provisions.

The taxpayer's claim for refund had not been filed in 1936, and, after its filing in 1937, taxpayer's right to a refund was contingent upon the Commissioner's allowance of the claim following a weighing of the relevant evidence, or upon the securing by taxpayer of a final decision in its favor from the Board of Review or from the appellate courts having jurisdiction to review the Board's decision. These contingencies existing in 1936 are comparable to those which this Court has thought were enough to prevent a right to income or a deduction to be sufficiently fixed for accrual. *Lucas* v. *American Code Co.,* 280 U.S. 445; *Lucas* v. *North Texas Co.,* 281 U.S. 11; *United States* v. *Safety Car Heating Co.,* 297 U.S. 88. It follows that taxpayer's right to a refund was not fixed until 1940,

when the Commissioner accepted taxpayer's offer of settlement which provided for a refund of $27,900 of the processing taxes paid.

Moreover, in 1936, the amount of the income to be accrued was not settled and could not have been ascertained with any reasonable certainty. There is no proof here that the *prima facie* extent to which the burden of the processing tax was borne under the method prescribed by Section 907 of the Revenue Act of 1936 was determinable from taxpayer's books in 1936.[4] But even if it had been, that would not necessarily have shown the amount of the refund, if any, to which taxpayer was entitled, since the *prima facie* presumption created by the margin evidence could have been rebutted by any other relevant evidence, including expert testimony. Thus, the amount of the refund due taxpayer was not ascertainable until the Commissioner had made a determination in its favor on the evidence submitted or until the appropriate Board and courts of review had weighed the evidence introduced by both parties and rendered a decision. In this connection, it is significant that taxpayer's claim for refund filed in 1937 (Ex. 6) claimed the full net

[4] The taxpayer's claim for refund (Ex. 6), filed in 1937, did not set out any of the information with respect to profit margins, required by Section 907 of the 1936 Act and Articles 605 and 606 of Treasury Regulations 96, to determine the *prima facie* extent to which taxpayer had borne the burden of the tax. The record does not indicate that such evidence was ever furnished or that an attempt to determine margins in accord with these provisions was ever made. Also, contrary to taxpayer's assumption, there is no proof that the amount of the refund was determined on the basis of margin evidence.

amount of processing taxes paid in 1933, 1934, and 1935 ($350,289.56), rather than the amount of $27,900 finally refunded pursuant to the compromise settlement, covering also 1934 and 1935 income tax liability and 1935 and 1936 unjust enrichment tax liability (Ex. 12). Further, it is relevant as indicating that the amount of the refund was not ascertainable in 1936, and indeed that taxpayer's right to a refund was not fixed at that time, that taxpayer did not accrue on its books any amount as the estimated amount of the refund. *Lucas* v. *American Code Co.,* 280 U.S. 445, 451.

Since neither the right to receive a refund nor the amount thereof was fixed prior to 1940 when the parties agreed that a refund of $27,900 only was to be made to taxpayer, the lower courts held, under principles established by this Court, that the income resulting from the refund was not accruable until that year.

2. *Continental Tie & L. Co.* v. *United States,* 286 U.S. 290, relied upon by taxpayer (Pet. 4, 5) as the principal basis for a conflict, is distinguishable from the present case. There the question was as to the proper year for accrual of income under Section 204 of the Transportation Act of 1920, which provided for an award to a railroad competing or connecting with one under federal control, if it sustained a deficit in operating income. The Act directed the Interstate Commerce Commission to compare the results of operation during federal control with a test period consisting of three years

ending June 30, 1917, and, if the result of operation was less favorable during the federal control period, to award an amount calculated as the section prescribed. The amount of the award to the taxpayer company in that case was determined and paid in 1923. This Court held (p. 295) that the right to payment ripened fully when the act became law in 1920, and that the function of the Interstate Commerce Commission was purely ministerial in ascertaining from taxpayer's books the amount to be paid. The Court further held (pp. 296-299) that the amount to be awarded could be ascertained with reasonable accuracy in 1920 since the only relevant data for computing the award were contained in entries in taxpayer's books and accounts made prior to March 1, 1920. In contrast, in the present case, Title VII of the Revenue Act of 1936 did not give an unconditional right to refund; nor was the function of the Commissioner, the Board of Review, and the appellate courts only ministerial. They were required to weigh evidence, resolve the conflicts, and declare the extent to which the tax burden was borne and the amount of the refund due. Nor was the amount of the refund ascertainable exclusively from entries in taxpayer's books and records. On the contrary, the amount of refund might be determined in whole or in part by any relevant evidence, including the testimony of witnesses and the margin data of other representative concerns in the same business and similarly situated.

The judgment below does not conflict with the various decisions of the lower appellate courts cited by taxpayer (Pet. 4-5), holding that just compensation above the standard return paid railroads for seizure and use of their properties during the period of federal control did not accrue as income in the year the amount of the compensation was determined and awarded, but that it accrued in the years in which it was earned. Not only did those cases involve provisions of the Federal Control Act which gave such railroads an unqualified right to receive just compensation for use of their properties, but the courts in those cases relied considerably upon the fact that, under the controlling statute there, the just compensation was earned and was to be paid annually. See especially, *Commissioner* v. *Old Dominion S.S. Co.*, 47 F. 2d 148, 149 (C.A. 2d); *Commissioner* v. *Midland Val. R. Co.*, 57 F. 2d 1042, 1043 (C.A. 10th); and *Helvering* v. *Gulf, M. & N. R. Co.*, 71 F. 2d 953, 955 (C.A. D.C.), affirmed on other grounds, 293 U.S. 295. Also in the *Gulf, M. & N.* case, last cited, at p. 955, the court pointed out that in the years for which the just compensation was paid a reasonable estimate of the amount could be made.

Finally, *Commissioner* v. *Dumari Textile Co.*, 142 F. 2d 897 (C.A. 2d), is not in conflict with the decision of the same court in this case. The opinion of the District Court, which the Court of Appeals approved (R. 46), adequately distinguishes

the *Dumari* case (R. 41, 43). It is to be noted that the *Dumari* case involved a claim for refund of floor stocks taxes under Section 602 of the Revenue Act of 1936, which contained provisions differing in various ways from Title VII and under which the determination of the Commissioner as to any claim was final and not reviewable. Further, the taxpayer there could and did estimate with reasonable accuracy, and accrued on its books in its fiscal year ended June 30, 1936, the total amount of the refund to which it was entitled, and it received in the following two years, as refunds from its vendors and the Commissioner, substantially the amount it had accrued as income in 1936. Under such facts, which are materially different from those here, the Court of Appeals affirmed the Tax Court and held that the income was properly accrued in 1936.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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SEPTEMBER, 1951.

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No. 233.

SEP
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IN THE

Supreme Court of the United States

October Term, 1951.

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Petitioner,

vs.

FRANK J. SHAUGHNESSY, as Collector of Internal Revenue for the 21st District of New York.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S REPLY BRIEF.

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